UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAOLO MORENO, an individual; LAWRENCE VAVRA, an individual; and GABRIEL MORENO, an individual, Plaintiffs, v. SFX ENTERTAINMENT, INC., a Delaware corporation with offices in California; ROBERT F.X. SILLERMAN, an individual; SHELDON FINKEL, an individual Defendants.	CV 14-880 RSWL (CWx) **ORDER RE: DEFENDANTS' MOTION TO DISMISS TWELFTH AND THIRTEENTH CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(6) [14] AND MOTION TO TRANSFER CASE TO SOUTHERN DISTRICT OF NEW YORK PURSUANT TO 28 U.S.C. § 1404(a) [15]**

Currently before the Court are Defendant Sheldon Finkel's Motion to Dismiss Twelfth and Thirteenth Claims Pursuant to Fed. R. Civ. P. 12(b)(6) [14] and Defendants SFX Entertainment, Inc. ("SFX") and Robert F.X. Sillerman's Motion to Transfer Case to Southern District of New York Pursuant to 28 U.S.C. § 1404(a) [15], both filed on April 2, 2014. Plaintiffs Paolo

Moreno, Gabriel Moreno, and Lawrence Vavra (collectively, "Plaintiffs") filed Oppositions on May 2, 2014 [19, 20]. Defendants filed Replies to their respective Motions on May 16, 2014 [24, 25]. These matters were taken under submission on June 3, 2014 [29]. Having reviewed all papers and arguments submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:**

The Court hereby **GRANTS** Defendant Finkel's Motion to Dismiss and **DENIES** Defendants SFX and Sillerman's Motion to Transfer.

I. BACKGROUND

Plaintiffs are experienced members of the electronic dance music ("EDM") community and are founders of Defendant SFX. Compl. ¶¶ 9-11. Plaintiffs spent nearly two years creating a business plan now known as Defendant SFX. Id. The global market for EDM has grown dramatically since 2009, prompting Plaintiffs to begin developing a business strategy to consolidate the industry in 2010 and 2011. Id. at ¶¶ 15-16.

Defendant SFX is a Delaware corporation with its principal place of business in New York, New York. Id. at ¶ 12. Defendants Sillerman and Finkel are New York citizens. Id. at ¶¶ 13-14. Defendant Sillerman owns 57% and Defendant Finkel owns 2% of Defendant SFX. Id. at ¶ 5.

In early January 2012, Plaintiffs and their colleague Donnie Estinopal met with Defendant Sillerman

to present a plan for a venture that would identify, acquire, consolidate, and operate assets in the EDM industry. Id. at ¶ 2. Specifically, on January 5, 2012, Plaintiff Paolo Moreno met with Defendants Sillerman and Finkel in Sillerman's office in New York City. Id. at ¶ 20. At this six-hour meeting, Defendant Sillerman represented that he would provide all necessary financing and Plaintiffs would negotiate and close deals. Id. In and after this meeting, Plaintiffs and Defendant Sillerman agreed to partner in a venture that is now known as Defendant SFX. Id. at ¶ 2. In the 72 hours after this meeting, Defendant Sillerman and Plaintiff Paolo Moreno exchanged emails wherein Plaintiffs were promised millions of "founders' shares," guaranteed annual stock options, and lucrative compensation packages. Id. at ¶ 21.

Plaintiffs allege that they and Defendant Sillerman reached a deal that granted Plaintiffs millions of "founders' shares" in the enterprise along with options, cash compensation, and control of the company. Id. at ¶¶ 3, 20-26. Plaintiffs contend that Defendant Sillerman never intended to honor the joint venture agreement. Id. at ¶ 27.

Plaintiffs allege that following the formation of the venture, they performed their role. Id. at ¶ 4. Plaintiffs worked full-time on the venture's behalf to close its most important and lucrative acquisitions, including seven of the eight principal assets

identified in Defendant SFX's S-1 Securities and Exchange Commission filing in support of its Initial Public Offering ("IPO"). Id. at ¶¶ 4, 30, 32-35.

Plaintiffs allege that although they inquired about formal documents memorializing their joint venture agreement with Defendant Sillerman, no such documents were forthcoming. Id. at ¶ 38. Instead, Defendants allegedly engaged in a pattern of evasion, delay, and deception to prevent the memorialization of the agreement and to avoid compensating Plaintiffs. Id. Defendant Sillerman also developed a corporate structure and IPO that would exclude Plaintiffs. Id. Ultimately, Defendants provided Plaintiffs with employment agreements providing for lower compensation than previously agreed and including onerous provisions. Id. at ¶ 40.

Plaintiffs filed their Complaint on February 5, 2014 [1]. Defendants SFX and Sillerman Answered on April 2, 2014 [12].

II. LEGAL STANDARD

A. Motion to Dismiss Pursuant to Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of one or more claims if the pleading fails to state a claim upon which relief can be granted. Dismissal can be based on a lack of cognizable legal theory or lack of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.

1990). However, a party is not required to state the legal basis for its claim, only the facts underlying it. McCalden v. Cal. Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990). In a Rule 12(b)(6) motion to dismiss, a court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. Klarfeld v. United States, 944 F.2d 583, 585 (9th Cir. 1991).

The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of its claim. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citation omitted). Although specific facts are not necessary if the complaint gives the defendant fair notice of the claim and the grounds upon which the claim rests, a complaint must nevertheless "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

If dismissed, a court must then decide whether to

grant leave to amend. The Ninth Circuit has repeatedly held that a district court should grant leave to amend even if no request to amend the pleadings was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

B. Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a)

Under 28 U.S.C. § 1404(a), "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

Before a court may transfer venue under 28 U.S.C. § 1404, it must find that: (i) the action is one that might have been brought in the transferee court and (ii) the convenience of the parties and the interest of justice favor the transfer. Colt Studio, Inc. v. Badpuppy Enter., 75 F. Supp. 2d 1104, 1112 (C.D. Cal. 1999) (citing Hatch v. Reliance Ins. Co., 758 F.2d 409, 414 (9th Cir. 1985)). Transfer under § 1404(a) is discretionary. A.J. Indus. v. U.S. Dist. Court for Cent. Dist. lf Cal., 503 F.2d 384, 389 (9th Cir. 1974). The purpose of § 1404(a) is to "prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Van Dusen v. Darrack, 376 U.S. 612, 616 (1964) (quoting Cont'l Grain Co. v. Barge

FBL-585, 364 U.S. 19, 26-27 (1960)).

An action is one that might have been brought in the transferee court when (i) the transferee court would have had subject matter jurisdiction at the time the action was filed; (ii) defendants would have been subject to personal jurisdiction; and (iii) venue would have been proper. E. & J. Gallo Winery v. F. & P. S.p.A., 899 F. Supp. 465, 466 (E.D. Cal. 1994) (citing Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960)).

In determining whether the convenience of the parties and the interest of justice favor transfer, the court should consider certain factors, including:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones v. GNC Franchising, 211 F.3d 495, 498-99 (9th Cir. 2000); see also Sec. Investor Prot. Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985).

The burden is on the moving party to demonstrate

that the balance of these factors favors the transfer. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1986); Pfeiffer v. Himax Techs., Inc., 530 F. Supp. 2d 1121, 1123 (C.D. Cal. 2008); Florens Container v. Cho Yang Shipping, 245 F. Supp. 2d 1086, 1089 (N.D. Cal. 2002). A transfer of venue is not appropriate unless the factors enumerated strongly favor venue elsewhere. Pac. Car & Foundry v. Pence, 403 F.2d 949, 953 (9th Cir. 1968). "The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." Decker Coal v. Commonwealth Edison, 805 F.2d 834, 843 (9th Cir. 1986).

III. DISCUSSION

A. Defendant Finkel's Motion to Dismiss

Plaintiffs allege claims for breach of fiduciary duty and interference with prospective economic advantage against Defendant Finkel. Compl. ¶¶ 123-36. Defendant Finkel moves to dismiss these claims, asserting that Plaintiffs fail to plead a basis for a fiduciary relationship between them and Finkel and allege no actionable interference or independently wrongful conduct. Mot. to Dismiss 1:11-14.

1. Twelfth Claim for Breach of Fiduciary Duty

Plaintiffs assert that, as their agent, Defendant Finkel owed them a fiduciary duty and that he failed to act in their interest by convincing Plaintiffs to forgo other business relationships and to partner with

Defendant Sillerman. Compl. ¶¶ 125-27.

Under California law, "[t]he elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." Love v. The Mail on Sunday, 489 F. Supp. 2d 1100, 1104 (C.D. Cal. 2007) (citing City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 68 Cal. App. 4th 445, 483 (1998)); Knox v. Dean, 205 Cal. App. 4th 417, 433 (2012). "The very meaning of being an agent is assuming fiduciary duties to one's principal." Chem. Bank v. Sec. Pac. Nat'l Bank, 20 F.3d 375, 377 (9th Cir. 1994) (citing Restatement (Second) of Agency § 1(1)); Recorded Picture Co. v. Nelson Entm't, Inc., 53 Cal. App. 4th 350, 369-70 (1997).

An agent is defined as "one who represents another, called the principal, in dealings with third persons." Cal. Civ. Code § 2295. "A principal-agent relationship exists if an agent or apparent agent holds the power to alter the relations between the principal and third persons, if an agent is a fiduciary, or if the principal has the right to control the conduct of the agent with matters entrusted to him." Wallis v. Centennial Ins. Co., Inc., 927 F. Supp. 2d 909, 916 (citing Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp., 148 Cal. App. 4th 937, 964 (2007)).

"A critical factor in determining the existence of an agency relationship is the degree of control

exercised by the principal over the agent." Figi Graphics, Inc. v. Dollar Gen. Corp., 33 F. Supp. 2d 1263, 1266 (S.D. Cal. 1998) (citing In re Coupon Clearing Serv., Inc., 113 F.3d 1091, 1099-1100 (9th Cir. 1997)). In Figi Graphics, the court found that an agency relationship did not exist between a defendant and a third party even though the third party was listed as an "agent" of the defendant on order forms, because the plaintiff did not plead facts demonstrating that the defendant had the "right to control" the third party's day-to-day activities, such as deciding where the third party found its products to import, what types of products to buy, who it bought the products from, or how much it paid. Id. at 1266-67.

Here, Plaintiffs allege only that Defendant Finkel agreed to "engage with third parties on Plaintiffs' behalf" to "help them partner with the right investor." Compl. ¶ 125. Plaintiffs fail to allege that they had any sort of right to control Defendant Finkel's conduct in this capacity. For example, Plaintiffs do not allege that they could control who Defendant Finkel met or on what terms he would approach potential investors. As such, Plaintiffs fail to allege a crucial element for the existence of an agency relationship.

Plaintiffs also fail to plead facts showing that Defendant Finkel had the authority to alter legal relations between Plaintiffs and third parties. Plaintiffs merely allege that Defendant Finkel was

"authorized" to "work on their behalf." Compl. ¶ 19. Defendant Finkel's alleged ability to "engage" with others and "facilitate" the funding of Plaintiffs' business plan does not suggest that he had the power to make legally-binding agreements for Plaintiffs on his own. Id. at ¶ 125. Plaintiffs also fail to plead facts showing that Defendant Finkel had power to bring Plaintiffs into legal relations with third parties.

The Court is not persuaded by Plaintiffs' contention that Defendant Finkel became their agent because Plaintiffs "entrusted him with confidential information about their business strategy . . . to enable him to perform his duties." Id. at ¶ 125. An agency or fiduciary relationship does not arise simply because confidential information is transmitted between the parties. See Nwabueze v. AT&T Inc., No. C 09-1529 SI, 2011 WL 332473, at *20 (N.D. Cal. Jan. 29, 2011); Parrish v. Nat'l Football League Players Ass'n, 534 F. Supp. 2d 1081, 1097 (N.D. Cal. 2007) (citing Oakland Raiders v. Nat'l Football League, 131 Cal. App. 4th 621, 633-34 (2005)). Without more, Plaintiffs' assertion that Defendant Finkel received confidential information during the course of the relationship does not indicate an agency relationship existed.

The Court finds that it is possible, however, for Plaintiffs to cure their claim by pleading additional facts. Lopez, 203 F.3d at 1130. As such, the Court **GRANTS** Defendant's Motion and dismisses Plaintiffs'

twelfth claim for breach of fiduciary duty **with leave to amend**.

2. Thirteenth Claim for Interference With Prospective Economic Advantage

Plaintiffs also bring a claim for interference with prospective economic advantage against Defendant Finkel on the basis that Finkel took advantage of Plaintiffs' confidential information to convince Plaintiffs to abandon a potentially valuable relationship with a prior investor and enter into a partnership with Defendant Sillerman. Compl. ¶¶ 131-35.

An interference claim arises when a defendant intentionally acts to disrupt an existing relationship with a high probability of economic benefit to a plaintiff and as a result the plaintiff suffers economic harm. Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153 (2003). To state a claim for interference with prospective economic advantage, a plaintiff must show:

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff, (2) the defendant's knowledge of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) economic harm to the plaintiff proximately caused by the acts of the

defendant.

Id. at 1153 (quoting Westside Center Assocs. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 521-22 (1996)). A plaintiff must show that the defendant's conduct was independently wrongful "by some legal measure other than the fact of interference itself." Id.

The Parties contest the "independent wrongfulness" of Defendant Finkel's actions. Mot. to Dismiss 9:9-16.

Conduct is independently wrongful when it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." Korea Supply, 29 Cal. 4th at 1159; Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc., 138 Cal. App. 4th 1215, 1221-22 (2006).

Plaintiffs contend that Defendant Finkel's conduct was independently wrongful because Finkel (1) breached his fiduciary duties to Plaintiffs and (2) misrepresented his intent to act as Plaintiffs' agent while conspiring with Defendant Sillerman to convince Plaintiffs to enter into a deal with Sillerman. Opp'n to Mot. to Dismiss 15:9-14.

To the extent that Plaintiffs rely on the breach of fiduciary duty as the basis for their interference claim, that argument is foreclosed by their failure to state such a claim. As stated *supra*, Plaintiffs have not pleaded facts showing that Defendant Finkel was their agent - and thus fiduciary.

Plaintiffs also argue that their interference claim is sufficiently pled because they allege that Defendant Finkel wrongfully misrepresented his intent to act as their agent. Opp'n to Mot. to Dismiss 17:27-18:3.

Claims of misrepresentation, however, must be "plead with particularity" pursuant to Fed. R. Civ. P. 9(b). See Vess v. Ciba-Geigy Corp, USA, 317 F.3d 1097, 1104-05 (9th Cir. 2003) (holding that allegations of fraudulent conduct must satisfy Rule 9(b)'s heightened pleading standard even when fraud is not an essential element of the claim). Here, Plaintiffs allege that Defendant Finkel "convinced" and "enticed" Plaintiffs to meet and partner with Defendant Sillerman and that Defendant Finkel made "promises" to them. Compl. ¶¶ 133-34. However, they have not identified any false statements that Defendant Finkel knowingly made regarding their partnership with Defendant Sillerman. Thus, Plaintiffs have failed to plead with particularity sufficient facts about the circumstances constituting Defendant Finkel's alleged misrepresentations.

Thus, because Plaintiffs have not alleged any independently wrongful conduct by Defendant Finkel, the Court dismisses Plaintiffs' thirteenth claim.

The Court allows Plaintiffs leave to amend, however, as it finds that Plaintiffs could possibly cure their claim by pleading additional facts. Lopez, 203 F.3d at 1130. Accordingly, the Court **GRANTS**

Defendant Finkel's Motion and dismisses Plaintiffs' thirteenth claim for interference **with leave to amend**.

B. Defendants SFX and Sillermans' Motion to Transfer

"District courts use a two-step analysis to determine whether a transfer is proper. The threshold question under Section 1404(a) requires the court to determine whether the case could have been brought in the forum to which the transfer is sought." Roling v. E*Trade Sec., LLC, 756 F. Supp. 2d 1179, 1184 (N.D. Cal. 2010) (citing 28 U.S.C. § 1404(a); Hatch, 758 F.2d at 414). "If venue would be appropriate in the would-be transferee court, then the court must make an 'individualized, case-by-case consideration of convenience and fairness.'" Id. (quoting Jones, 211 F.3d at 498).

Defendants seek to transfer this case to the Southern District of New York ("SDNY"). Mot. to Transfer 1:3-15. Plaintiffs oppose and seek to keep this Action in the Central District of California ("CACD"). Opp'n to Mot. to Transfer 1:12-14.

1. Action Could Have Been Brought in the SDNY

As a threshold inquiry, this Court first determines if this Action could have originally been brought in the SDNY. See 28 U.S.C. § 1404(a). The Court must find whether the SDNY would have had subject matter jurisdiction at the time the action was filed, the Defendants would have been subject to personal jurisdiction there, and venue would have been proper.

E. & J. Gallo Winery, 899 F. Supp. at 466.

Complete diversity exists as Plaintiffs are citizens of California, Defendants Sillerman and Finkel are citizens of New York, and Defendant SFX is a Delaware corporate with its principal place of business in New York. Compl. ¶ 7. Plaintiffs seek relief in an amount greater than $75,000. Id. Such is enough to establish subject matter jurisdiction based on diversity of citizenship. 28 U.S.C. § 1332(a)(1).

As Defendant SFX's principal place of business is in New York and Defendants Sillerman and Finkel are citizens of New York, all Defendants are subject to personal jurisdiction in New York. Compl. ¶¶ 12-14.

Venue would have been proper in the SDNY. A civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(b)(1). Defendants Sillerman and Finkel are both domiciled in New York (Sillerman Decl. ¶¶ 1, 14), and reside there for venue purposes (28 U.S.C. § 1391(c)(1)). Defendant SFX has its principal place of business in the SDNY (Sillerman Decl. ¶ 4), meaning that it resides there for venue purposes (28 U.S.C. § 1391(c)(2)). As Defendant SFX resides in the SDNY and Defendants Sillerman and Finkel reside in New York State, venue would have been proper in the SDNY.

The Court finds that this Action could have originally been brought in the SDNY. As such, the

Court turns to the next inquiry: whether considerations of convenience and fairness warrant transfer. See Park v. Dole Fresh Vegetables, Inc., 964 F. Supp. 2d 1088, 1093 (N.D. Cal. 2013) (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)).

2. Convenience and Fairness Do Not Warrant a Transfer to the SDNY

"Pursuant to Section 1404(a), a court should consider: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interest of justice." Park, 964 F. Supp. 2d at 1093 (citing 28 U.S.C. § 1404(a)). Other factors may be considered, including:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones, 211 F.3d at 498-99.

a. *Convenience of the Parties*

The convenience of the Parties weighs against

transfer. Plaintiffs would face financial hardship if forced to litigate in New York. Paolo Moreno Decl. ¶ 4; Gabriel Moreno Decl. ¶ 4; Vavra Decl. ¶ 4. There is also a significant disparity in the resources available to Plaintiffs and to Defendants as Plaintiffs are individual entrepreneurs while Defendant SFX is a large, financially sound corporation. See Paolo Moreno Decl. ¶ 4; Gabriel Moreno Decl. ¶ 4; Vavra Decl. ¶ 4; Compl. ¶ 1; see also SFX Entm't, Inc., Quarterly Report (Form 10-Q) (May 15, 2014) (Defendant SFX's most recent quarterly report indicates that as of March 31, 2014, Defendant SFX had $694,709,000 in total assets)[1]. As such, the convenience of the Parties weighs against transfer. Allstar Mktg. Grp., 666 F. Supp. 2d at 1132 (quoting Hernandez v. Graebel Van Lines, 761 F. Supp. 983, 989 (E.D.N.Y. 1991)) ("[W]here a disparity between the parties exists, such as an individual plaintiff suing a large corporation, the court may also consider the relative means of the parties in determining whether to transfer.").

The Parties' respective contacts with the CACD also weighs against transfer. The CACD is Plaintiffs' home forum. See Gabriel Moreno Decl. ¶ 3; Paolo Moreno Decl. ¶ 3; Lawrence Vavra Decl. ¶ 3. Defendant SFX also appears to have some contacts with the CACD. See

[1] Federal Rule of Evidence 201 permits a court to "take judicial notice on its own." SEC filings are judicially noticeable public records. Plevy v. Haggerty, 38 F. Supp. 2d 816, 821 (C.D. Cal. 1998).

Opp'n to Mot. to Transfer Ex. A (a printout of Defendant SFX's LinkedIn profile stating that SFX is "[b]ased in New York, Los Angeles, and various cities around the world"). The Court thus finds that this factor weighs against transferring the case.

Likewise, the contacts relating to Plaintiffs' causes of action weigh against transfer. Defendants note that the Parties negotiated the underlying agreement in New York. Mot. to Transfer 9:8-10:5. However, this fact is firmly addressed, *infra*, under the first Jones factor and the Court declines to consider it twice. See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Simpson Mfg. Co., 829 F. Supp. 2d 914, 929 (D. Haw. 2011). Moreover, Plaintiffs argue that this judicial district has a substantial connection to their claims because Plaintiffs negotiated the acquisition of many of Defendant SFX's investments in Los Angeles and received many of Defendant Sillerman's allegedly fraudulent communications in Los Angeles. Opp'n to Mot. to Transfer 16:19-18:3 (citing Vavra Decl. ¶¶ 6, 8-11; Paolo Moreno Decl. ¶¶ 7, 9, Ex B; Gabriel Moreno Decl. ¶¶ 7-8, Ex. A). Plaintiffs have thus shown that at least some of the allegedly harmful acts occurred in this judicial district, therefore weighing against transfer. See In re Ferrero Litig., 768 F. Supp. 2d 1074, 1079 (S.D. Cal. 2011) (citing Rafton v. Rydex Series Funds, No. C. 10-1171 CRB, 2010 WL 2629579, at

*3 (N.D. Cal. June 29, 2010)) (denying transfer to New Jersey even though the defendant's alleged misrepresentations and omissions may have occurred in New Jersey, the plaintiffs' reliance upon those statements occurred in California). As Plaintiffs have shown that they relied upon alleged misrepresentations in this judicial district, the Court finds that this factor weighs toward retaining the case.

b. *Convenience of the Witnesses*

"The convenience of witnesses is often the most important factor in determining whether a transfer pursuant to § 1404 is appropriate." Amini Innovation Corp. v. JS Imports, Inc., 497 F. Supp. 2d 1093, 1111 (C.D. Cal. 2007). Because party and employee witnesses may be compelled to testify regardless of forum, courts accord less weight to their inconvenience. Allstar Mktg. Grp., 666 F. Supp. 2d at 1132; see also Hawkins v. Gerber Prods. Co., 924 F. Supp. 2d 1208, 1215 (S.D. Cal. 2013) ("primary consideration is given to third party witnesses as opposed to employee witnesses").

Defendants contend that material witnesses are located in or closer to New York. Mot. to Transfer 8:22-9:7. Specifically, Defendants state that Defendants Sillerman and Finkel, and witnesses Mitchell Nelson and Mitchell Slater are based in New York. Sillerman Decl. ¶ 14. Defendants also note that Donnie Estopinal, another witness, resides in Puerto Rico. Id. at ¶ 17. These witnesses, Defendants contend, will

testify regarding the negotiation of the alleged underlying agreement and on whose idea it was to acquire Disco Donnie Presents and Dayglow, some of Defendant SFX's core assets. Id. at ¶¶ 14, 16. Defendants also suggest that several non-party investor witnesses based in New York will testify on the recapitalization of Defendant SFX. Id. at ¶ 19.

Defendants Sillerman and Finkel are both parties to this Action and their inconvenience is accorded less weight. Similarly, Messrs. Slater and Nelson are employed by Defendant SFX and their inconvenience is given less weight. Sillerman Decl. ¶¶ 11-12. Furthermore, not only is Mr. Estinopal the principal of one of Defendant SFX's companies (id. at ¶¶ 16-17), but he also resides in Puerto Rico (id. at ¶ 17), meaning that he would be inconvenienced no matter where this case is litigated. Because they are employees or parties, the Court discounts any inconvenience to Defendants' named witnesses.

"'The movant is obligated to clearly specify the key witnesses to be called and make at least a generalized statement of what their testimony would have included.'" Amini Innovation Corp., 497 F. Supp. 2d at 1111 (quoting Fireman's Fund Ins. Co. v. Nat'l Bank for Cooperatives, No. C 92-2667 BAC, 1993 WL 341274, at *4 (N.D. Cal. Aug. 27, 1993)). Defendants' allusions to "[t]he principals of Dayglow" and to "outside investors who participated in the final

capitalization of the company" are insufficient to support their Motion. Sillerman Decl. ¶¶ 18-19. Defendants "must name the witnesses, state their location, and explain their testimony and its relevance" and have failed to do so for these witnesses. Costco Wholesale Corp., 472 F. Supp. 2d at 1193 (citing Carolina Cas. Co. v. Data Broad. Corp., 158 F. Supp. 2d 1044, 1049 (N.D. Cal. 2001); Williams v. Bowman, 157 F. Supp. 2d 1103, 1108 (N.D. Cal. 2001))[2]. Thus, Defendants have failed to meet their burden in showing inconvenience to their witnesses.

Plaintiffs, in contrast, identify five non-party witnesses located in the CACD, Ronald Burkle, Billy Keane, Frank Quintero, Gary Richards, and Rick Stevens, who are expected to testify on Plaintiffs' business plan, their interaction with investors prior to meeting with Defendant Sillerman, and their work on behalf of Defendant SFX. Vavra Decl. ¶ 12. Plaintiffs' detailed and substantial list of relevant non-party witnesses weighs against transfer.[3] See Florens Container v. Cho

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[2] Contrary to Defendants' assertion, the court in Costco Wholesale Corp. explicitly held that the defendant's unnamed witnesses could not be considered "because defendant failed to identify them." 472 F. Supp. 2d at 1193. The court was "*also* unpersuaded that these unnamed witnesses would offer relevant testimony." Id. (emphasis added).

[3] Defendants' argument that several of Plaintiffs' proffered witnesses are unnecessary (Reply to Mot. to Transfer 5:1-17) does have some weight as the Court has granted Defendant Finkel's Motion to Dismiss. Even allowing for that, Defendants have still failed to sufficiently identify any non-party witnesses who will be inconvenienced without a transfer to the SDNY.

Yang Shipping, 245 F. Supp. 2d 1086, 1093 (N.D. Cal. 2002) (denying transfer motion where plaintiff provided a persuasive account of who its witnesses were, where they were located, and why their testimony was relevant when defendants offered no such account and simply stated that their witnesses resided elsewhere).

Because Defendants fail to sufficiently identify any non-party witnesses who would be inconvenienced if this Action were not transferred and Plaintiffs present a detailed list of such witnesses, the Court finds that Defendants have failed to meet their burden in showing the inconvenience to their witnesses. The convenience of the witnesses weighs against transfer.

The Court finds further support in the fact that Defendants fail to name any non-party witnesses who would be subject to compulsory process in New York. Jones, 211 F.3d at 498-99. Beyond the fact that their testimony likely could be compelled as employees of Defendant SFX (Allstar Mktg. Grp., 666 F. Supp. 2d at 1132), Mr. Estinopal and the principals of Dayglow also reside outside of the SDNY (Sillerman Decl. ¶¶ 17-18) and would not be subject to compulsory process there (Fed. R. Civ. P. 45(b)(2)). Plaintiffs, on the other hand, do name non-party witnesses residing in the CACD whose testimony would likely require compulsory process. Vavra Decl. ¶ 12.

c. *Other Convenience Factors*

The agreement underlying this Action was negotiated

in New York (Compl. ¶ 20; Sillerman Decl. ¶¶ 11-13), thus weighing in favor of transfer. The remaining Jones factors weigh against transfer or are neutral.

Plaintiffs argue that this Court is more familiar with the governing law because their claims are all brought under California law. See Opp'n to Mot. to Transfer 19:5-20:4. Defendants aver that this factor is neutral because those claims sound in common law. Mot. to Transfer 10:19-11:15. This diversity case arises in California, meaning that California law applies. Allstate Ins. Co. v. Smith, 929 F.2d 447, 449 (9th Cir. 1991). Plaintiffs plead numerous contract, tort, and California statutory claims. See Compl. ¶¶ 45-136. Where California law applies to a plaintiff's claim, a federal court located in California is more familiar with California law. See In re Ferrero Litig., 768 F. Supp. at 1081 (finding factor weighed against transfer where plaintiffs brought California statutory and breach of warranty claims); Getz v. Boeing Co., 547 F. Supp. 2d 1080, 1085 (N.D. Cal. 2008). This factor thus weighs against transfer.

Ordinarily, a "defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." Decker Coal, 805 F.2d at 843 (citing Mizokami Bros. of Ariz. v. Mobay Chem. Corp., 660 F.2d 712, 718 (8th Cir. 1981)). In other words, "a plaintiff's choice of venue is generally accorded deference." Allstar Mktg. Grp., LLC v. Your Store

Online, LLC, 666 F. Supp. 2d 1109, 1131 (C.D. Cal. 2009). Here, Plaintiffs have chosen to sue in their home forum. See Gabriel Moreno Decl. ¶ 3; Paolo Moreno Decl. ¶ 3; Lawrence Vavra Decl. ¶ 3. As such, their choice of forum is afforded substantial weight and weighs against transfer. See In re Ferrero Litig., 768 F. Supp. 2d at 1078 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981)).

Defendants concede that the sixth Jones factor is neutral. Mot. to Transfer 10:17-18.

Defendants argue that New York offers a greater ease of access to sources of proof. Mot. to Transfer 10:6-11. Plaintiffs argue that Defendants have not met their burden on this point. Opp'n to Mot. to Transfer 22:1-23:11. Even if the majority of documents pertaining to the recapitalization of Defendant SFX were located in New York, Defendants offer no reason why this fact would impose a significant burden on their litigation in this judicial district. "With technological advances in document storage and retrieval, transporting documents does not generally create a burden." Van Slyke v. Capital One Bank, 503 F. Supp. 2d 1353, 1362 (N.D. Cal. 2007) (citing Vitria Tech. Inc. v. Cincinnati Ins. Co., No. C 05-01951 JW, 2005 WL 2431192, at *5 (N.D. Cal. Sept. 30, 2005)). Accordingly, the Court finds that this factor does not weigh in favor of transfer.

d. *Conclusion*

The Court finds that the vast majority of convenience factors weighs against transfer. Defendants have not met their heavy burden in showing that "the convenience of parties and witnesses, [or] the interest of justice" requires the transfer of this Action. 28 U.S.C. § 1404(a); Allstar Mktg. Grp., 666 F. Supp. 2d at 1131 (quoting STX, Inc. v. Trik Stik, Inc., 708 F. Supp. 1551, 1555-56 (N.D. Cal. 1988)). Therefore, the Court **DENIES** Defendants' Motion to Transfer.

IV. CONCLUSION

For the reasons set forth above, this Court **GRANTS** Defendant Finkel's Motion to Dismiss [14] and **DISMISSES** Plaintiffs' twelfth and thirteenth claims with **twenty days leave to amend** and **DENIES** Defendants SFX and Sillerman's Motion to Transfer [15].

IT IS SO ORDERED.

DATED: August 1, 2014

RONALD S.W. LEW

HONORABLE RONALD S.W. LEW
Senior U.S. District Judge